

01 petition should be denied.

02 PROCEDURAL BACKGROUND

03 On September 6, 1996, petitioner was convicted in a jury trial in this Court with conspiracy
04 to distribute cocaine, distribution of cocaine, and possession of cocaine with intent to distribute.
05 The Court sentenced petitioner to 240 months confinement, followed by five years of supervised
06 release. Carol Koller, of the Federal Public Defender's Office, represented petitioner at trial and
07 sentencing, but thereafter withdrew as counsel.

08 With newly-appointed counsel, petitioner appealed his conviction in the Ninth Circuit
09 Court of Appeals. His counsel argued that evidence obtained pursuant to a search warrant should
10 have been suppressed, that a law enforcement witness and the prosecutor impermissibly vouched
11 for the informant involved in the case, and that the admission of post-arrest statements from his
12 co-defendant Gilbert Sanchez and the informant's testimony linking petitioner to the Mexican
13 Mafia denied him a fair trial. (Dkt. 43, Ex. A.) In a supplemental *pro se* brief, petitioner argued
14 that the government failed to timely disclose exculpatory evidence in the form of post-arrest
15 statements made by Sanchez in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). (*Id.*, Ex. J.)
16 Petitioner asserted that Sanchez denied that he worked for petitioner or had any knowledge
17 regarding petitioner's involvement in cocaine trafficking, and attempted to provide information
18 about his cocaine suppliers in California. (*Id.*) In an unpublished decision dated March 5, 1998,
19 the Ninth Circuit affirmed petitioner's conviction. (*Id.*, Ex. A.)

20 On March 5, 1999, acting *pro se*, petitioner filed a § 2255 petition in this Court. See
21 *Mercado-Ulloa v. United States*, No. C99-314JCC. He identified ten grounds for relief: (1)
22 ineffective assistance of counsel; (2) lack of evidence; (3) prosecutorial misconduct through

01 suppression of evidence and witnesses; (4) outrageous government conduct through oppression
02 to induce false statements and intimidation of material witnesses; (5) abuse of discretion; (6) lack
03 of jurisdiction; (7) illegal search and seizure; (8) outrageous government terrorism; (9) actual,
04 factual, and legal innocence; (10) miscarriage of justice. *Id.* (Dkt. 1). United States Magistrate
05 Judge David Wilson rendered a Report and Recommendation recommending denial of the petition
06 based on the fact that it contained merely a list of conclusory allegations, without any supporting
07 facts or legal argument. *Id.* (Dkt. 19). The Court adopted the Report and Recommendation and
08 denied the petition. *Id.* (Dkt. 22).

09 In May 2003, petitioner filed a motion in the Ninth Circuit Court of Appeals seeking
10 permission to file a second or successive § 2255 petition. *Id.* (Dkt. 23). He based his request on
11 a letter sent to this Court in May 2001 in which Sanchez stated that petitioner had nothing to do
12 with the drug activity at issue in this case, and on an investigation of his then attorney, John Reed,
13 into the tapes introduced and transcripts used at trial. On August 31, 2003, the Ninth Circuit
14 granted petitioner's request to file a successive petition. *Id.*

15 On December 13, 2005, petitioner, again acting *pro se*, filed his successive petition in this
16 Court. (Dkt. 1.) Upon petitioner's motion, the Court appointed counsel. (Dkt. 9.) Petitioner
17 now proceeds pursuant to an amended petition filed by his counsel. (Dkt. 29.)

18 EVIDENCE AT TRIAL

19 Following his arrest for drug dealing in the spring of 1996, Isauro Ontiveros Pantoja
20 entered into a cooperation agreement with the Unified Narcotics Enforcement Task Force
21 (UNET). Trial Record (TR) 61-62, 131-33. Pursuant to that agreement, Pantoja identified as a
22 drug dealer, among others, Samuel Mercado. TR 66, 135, 174.

01 Acting under the supervision of UNET officers, Pantoja attempted to locate Mercado in
02 Bellingham, Washington. TR 66, 137, 217. Upon discovering that Mercado's Bellingham
03 restaurant had closed, Pantoja left a message with his telephone number for Mercado at a different
04 Mexican restaurant in the area. TR 137-39, 217-18. Pantoja received a return telephone call from
05 Gilbert Urrea Sanchez, a previous acquaintance. TR 139-40, 229. He arranged a meeting with
06 Sanchez in Centralia, Washington. TR 141, 233-35.

07 Pantoja and Sanchez met in late April 1996. TR 69. They discussed prices for a kilogram,
08 or kilo, of cocaine. TR 237-38. Pantoja inquired about quarter kilos, but Sanchez informed him
09 that they only wanted to deal in kilos, at the price of \$21,000.00. *Id.* Pantoja testified at trial that
10 Sanchez told him he (Sanchez) was working with Mercado selling drugs, that Mercado was going
11 back to California, and that he was temporarily taking over Mercado's business during Mercado's
12 absence. TR 239-40. Pantoja indicated he could get the money for half a kilo, and Sanchez told
13 him he would speak with Mercado and thought that would be acceptable. TR 241. Sanchez told
14 Pantoja to contact him using Mercado's pager number and to use a particular type of code to
15 conduct business. TR 240-42.

16 On May 8, 1996, Pantoja contacted Sanchez via the pager number and arranged to
17 purchase a kilo of cocaine. TR 145. Pantoja and Sanchez met the following day. TR 70, 145-47,
18 245. Pantoja wore a body wire to record their conversation. TR 70. Sanchez informed Pantoja
19 that Mercado did not want to sell him the cocaine, noting Pantoja's recent arrest. TR 190, 246-
20 50. Pantoja told Sanchez he wanted to speak directly to Mercado and Sanchez agreed to relay
21 the message. TR 250. UNET detectives followed Sanchez after the meeting and noted his driving
22 appeared consistent with an effort to avoid surveillance. TR 72-75. Sanchez eventually drove to

01 8848 Northwood in Lynden, Washington, the address at which Mercado resided. TR 74.

02 Pantoja testified that he called the pager number following the May 9, 1996 meeting and
03 received a call from Mercado the next day. TR 251. Pantoja described Mercado as saying that
04 “things were a little hot,” but that he was willing to “do the deal” if Pantoja had the money. *Id.*
05 Mercado said he would send Sanchez to Centralia with the kilo. TR 252.

06 Pantoja met Sanchez in Centralia on May 11, 1996 with the intention of purchasing a kilo
07 of cocaine. TR 76, 252-53. He had \$11,000.00 given to him by UNET detectives and would be
08 fronted the remainder of the kilo. TR 70, 253. Sanchez told Pantoja that the cocaine was under
09 the hood of his car near the battery. TR 253. Pantoja drove Sanchez’s vehicle to a predetermined
10 location and gave the kilo to UNET detectives. *Id.* He then delivered the money to Sanchez and
11 they further discussed the use of codes to arrange drug deals. TR 254-56. The government
12 introduced at trial a piece of paper on which Sanchez wrote down the codes. *Id.* Sanchez spent
13 that night at Pantoja’s house. TR 254. The following day, UNET detectives followed Sanchez
14 to the 8848 Northwood address in Lynden. TR 80-81.

15 Pantoja arranged another meeting in Bellingham for May 14, 1996. TR 81. He testified
16 that he called the pager number once he arrived in Bellingham and received a call in return from
17 Mercado. TR 257. Pantoja then met with Mercado and Sanchez at a McDonalds. TR 258.
18 Again, Pantoja wore a body wire to record the conversation. TR 266. Pantoja testified at trial
19 that they discussed at that meeting, *inter alia*, the use of codes to arrange drug deals, getting jobs
20 pruning trees in order to give an appearance of legitimacy, the need for Pantoja to obtain a pager,
21 places to meet, and Mercado and Sanchez making trips to California. TR 259-62, 267-75.

22 Pantoja testified that he subsequently tried unsuccessfully to contact Sanchez and

01 Mercado. TR 275. Sanchez eventually called Pantoja and told him they were on their way back
02 from California. TR 275-76. Pantoja arranged a buy to take place in Chehalis. TR 157-58, 276-
03 77. UNET detectives used the pager and entered the code for two kilos of cocaine. TR 158.

04 Drug Enforcement Administration (DEA) Special Agent Jeffery Pullig testified that he
05 conducted surveillance at Mercado's residence on May 30, 1996. TR 344. He observed Mercado
06 reaching into the trunk of a Chrysler Cordoba at that residence. TR 344-46. Shortly thereafter,
07 he observed Sanchez drive the car away. TR 346-47.

08 Pantoja met Sanchez in Centralia on May 31, 1996. TR 277. Pantoja again drove
09 Sanchez's car and delivered the kilo of cocaine contained within to UNET detectives. TR 83-84.
10 The UNET detectives instructed Pantoja to deliver a dummy package of cash to Sanchez. TR 84.
11 The agents followed Sanchez on his drive back to Bellingham with the package. TR 85. Sanchez
12 again engaged in counter-surveillance and the UNET detectives, joined by DEA agents, stopped
13 him and placed him under arrest. TR 85-87.

14 UNET detective Thomas Zweiger testified that, after his arrest, Sanchez said he was not
15 the one making all the money off the drugs and that he merely worked for someone in the
16 Bellingham area. TR 87. Sanchez told the law enforcement agents that he lived at 1931
17 Humboldt Street in Bellingham and had six kilos of cocaine hidden in his car at that house. TR
18 88. He accompanied UNET detectives to his residence and consented to a search of his house and
19 car. TR 88-89. The officers searched a 1979 Chrysler Cordoba at Sanchez's house and recovered
20 from within the car six kilos of cocaine inside a black and gray tweed bag with red vinyl trim. TR
21 89. They also found \$4000.00 in cash in Sanchez's house. TR 90.

22 On June 1, 1996, DEA Special Agents and UNET detectives served a search warrant for

01 Mercado's residence. TR 90-91. They recovered the pager used by Sanchez to receive calls from
02 Pantoja, \$5000.00 in cash found in a closet, \$3000.00 in cash found in Mercado's wife's purse,
03 and a tweed bag identical to the bag found in the Chrysler Cordoba. TR 91-92, 163-64.

04 At trial, the landlord of the residence at 1931 Humboldt Street in Bellingham testified that
05 she met a male, "Israel," and female, "Maria," interested in renting the house in late April or early
06 May 1996. TR 328-29. The landlord identified Mercado in court as Israel. TR 329. Mercado
07 told the landlord he was seeking to rent the house for his boss, Gilbert Sanchez, and that they
08 worked planting trees and would be out of town a lot. TR 330-31. He paid a deposit of \$300.00
09 from a large amount of cash on his person and later stopped by to pay the \$700.00 first month's
10 rent in cash. TR 332-34. The landlord saw Mercado leaving the house a week later and, at that
11 time, met Sanchez. TR 335.

12 The government admitted tapes of the May 9th and May 14th conversations into evidence
13 at trial. TR 249, 266. The tapes were not played at trial, but the Court allowed the government
14 to use transcripts of the tapes to assist the jury. TR 177-79, 248, 266-67.

15 Neither Mercado, nor Sanchez testified at trial. Petitioner's counsel called Vasario Rubio,
16 who testified that he purchased a 1987 Dodge Caravan from Mercado's wife. TR 367-68. He
17 paid \$1000.00 down and was late with the rest of his payments. *Id.* Mercado's wife contacted
18 Rubio on May 12, 1996 and asked him to pay the rest of the money. TR 369. He paid the
19 remainder of the amount due in cash on May 26, 1996. TR 370.

20 DISCUSSION

21 As noted above, petitioner raises two ground for relief and requests an evidentiary hearing.
22 A § 2255 petitioner "is entitled to an evidentiary hearing, '[u]nless the motion and the files and

01 records of the case conclusively show that the prisoner is entitled to no relief[.]” *United States*
02 *v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (quoting 28 U.S.C. § 2255). The Ninth Circuit
03 characterizes this standard as asking whether “the movant has made specific factual allegations
04 that, if true, state a claim on which relief could be granted.” *Id.* (quoting *United States v.*
05 *Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984) (“A hearing must be granted unless the movant’s
06 allegations, when viewed against the record, do not state a claim for relief or are so palpably
07 incredible or patently frivolous as to warrant summary dismissal.”)) In this case, the undersigned
08 concludes that, because petitioner fails to state a claim on which relief can be granted, his request
09 for an evidentiary hearing and habeas relief should be denied.

10 A. Ineffective Assistance of Counsel

11 The Sixth Amendment guarantees a criminal defendant the right to effective assistance of
12 counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts evaluate claims of
13 ineffective assistance of counsel under the two-prong test set forth in *Strickland*. Under that test,
14 a defendant must prove (1) that counsel’s performance fell below an objective standard of
15 reasonableness and (2) that a reasonable probability exists that, but for counsel’s error, the result
16 of the proceedings would have been different. *Id.* at 687-94.

17 When considering the first prong of the *Strickland* test, judicial scrutiny must be highly
18 deferential. *Id.* at 689. There is a strong presumption that counsel’s performance fell within the
19 wide range of reasonably effective assistance. *Id.* The Ninth Circuit has made clear that “[a] fair
20 assessment of attorney performance requires that every effort be made to eliminate the distorting
21 effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to
22 evaluate the conduct from counsel’s perspective at the time.” *Campbell v. Wood*, 18 F.3d 662,

673 (9th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689).

The second prong of the *Strickland* test requires a showing of actual prejudice related to counsel's performance. The reviewing court need not address both components of the inquiry if an insufficient showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both components are to be considered, there is no prescribed order in which to address them. *Id.*

Petitioner's ineffective assistance of counsel claim pertains to the May 14, 1996 tape introduced and transcript used at trial. Petitioner asserts that Koller, his trial counsel, stipulated to the introduction of this transcript into evidence without objection and without conducting a reasonable investigation into the audibility of the tape upon which the transcript was based.

Petitioner's former counsel (Reed) in relation to his successive petition obtained copies of the tapes of the May 1996 conversations from Sanchez's former trial counsel, Jennifer Shaw. Reed, now deceased, gave copies of the tapes to Darryl Carson, a former investigator for the United States Immigration Service, previously qualified as an expert in court for his Spanish speaking ability, and currently a private investigator in California. Carson concluded as follows:

Except for the beginning of the tapes where the DEA Agent conducting the case (or a part thereof); I could not hear the tape sufficiently to be able to give any cogent response to what was being said on the tapes.

The tapes seem to be garbled to the extent and degree that except for a few words here and there; I was unable to understand them in their fullness or meaning.

(Dkt. 30, Ex. 1.) Theresa Ortal, another bilingual investigator given the tapes by Reed, opined as follows:

As a bilingual expert in investigation and translation – Spanish to English and vice-

01 versa – who was qualified in various courts in this speciality and expertise, it is my
02 opinion that the disjointed fragments contained in all the audio specimens – including
03 that of May 14, 1996 – could not support a transcript which purported to contain
04 word by word transcription of these disjointed and fragmented utterances.

05 Based on my experience as an investigator, of 26 years, for the Los Angeles County
06 District Attorney's Office and the Orange County Public Defender's Office, it is my
07 opinion that no legally tenable conclusion regarding the nature and content of these
08 recordings can be supported.

09 Specifically, a conviction of one of the alleged participants, Samuel Mercado, based
10 in whole or in part on incriminating code words supposedly uttered in these
11 conversations by Mr. Mercado would, in my expert opinion, be completely
12 unsupported by anything contained in the examined material that was given to me.

13 (*Id.*, Ex. 4.) Also, John Mitchell, an audio engineer, rendered the following opinion:

14 My not knowing the language prevented me from determining the success or
15 failure of the processing. However, it is my impression that sufficient voice signal
16 strength regarding diction cues is not constantly present on the original recording,
17 rather the voice strength is intermittent in relationship to the environmental noise and
18 creates an unacceptable signal-to-noise ratio. This results is [sic] diction cues
19 blending with the noise and making individual words impossible to discern. This sort
20 of recording often results in what we call auditory illusions. That is, a word formant
21 structure blending with the frequency structure of another sound resulting in the
22 listener believing a specific utterance was spoken when in fact it is something entirely
different. This is a common occurrence and problem with this type of audio.

Although it is likely some words can be clearly understood there is the real
possibility of obtaining only partial words and phrases, being the unwitting victim of
auditory illusions, and even having areas of dialogue where nothing can be discerned.
All of this is likely to result in the misinterpretation of the dialogue content, perhaps
even discernible words and phrases being interpreted out of context. It might be
possible to retrieve certain words and phrases through additional forensic processing,
but this is a very difficult, time consuming and extremely expensive endeavor with the
results being unknown until it is done. It is my impression that this recording in its
current form should be considered to be unreliable.

For the same reasons stated above spectrographic voice identification is not
feasible. The voice and noise is blended to such an extent as to render a spectrogram
unreadable.

01 (*Id.*, Ex. 3.)

02 Upon his appointment, petitioner's current counsel retained the services of federal court
03 certified interpreter Mario Flores to compare a tape of the May 14th conversation to two
04 transcripts – one containing side-by-side Spanish and English, and one solely in English. Flores
05 identified “78 (seventy-eight) material errors classified as ‘Omissions, additions, and/or changes’
06 in the transcription from Spanish into Spanish[,]” and “43 (forty three) material errors” in the
07 English only transcript. (*Id.*, Ex. 14.) He further stated:

08 . . . The Spanish-English Transcription and Translation contains many utterances
09 labeled “UI” for “Unintelligible,” which affects the contextual meaning of individual
10 words, potentially resulting in an inaccurate understanding of what was said in
11 Spanish and a distortion of the English translation, since much of the translation is
12 then rendered as literal words in the absence of context.

13 . . . The Spanish-English Transcription and Translation and the English-only
14 translation assign utterances to specific speakers by name, which I cannot corroborate
15 without a voice sample of the three main individuals allegedly participating in the
16 recorded conversation.

17 *Id.*

18 Petitioner notes Koller's apparent awareness of problems with the audibility of the tapes
19 and her employment of a court certified interpreter to review the tapes and transcripts. Petitioner
20 further notes Koller's failure to employ an audio engineer to review the tapes or to make an effort
21 to correctly identify the speakers on the tapes using voice samples of the participants. Petitioner
22 surmises that the individuals who prepared the transcripts likely relied on the assistance of Pantoja,
an informant with questionable credibility, to determine voice identification. He maintains that
reasonably competent counsel should have done more to investigate the accuracy and authenticity
of the transcripts and should have objected to the admission of the tape into evidence. Petitioner

01 also avers that Koller should have used the differences between the various transcripts to impeach
02 the transcript used at trial. He argues that, given that the evidence against him consisted largely
03 of the testimony of a paid informant with minimal corroborating evidence, there is a reasonable
04 likelihood that, but for Koller's errors, the result of the trial would have been different.

05 Respondent provides and the record reveals more detailed information regarding the May
06 14th tape and transcripts. The government initially had the May 1996 conversations translated by
07 Brian Clarke of Pro Trans, an independent translation company. Clarke produced the above-
08 described side-by-side transcription of Spanish and English. The government gave the tapes and
09 transcripts to Koller and Shaw.

10 Koller hired Glenna White to review the May 14th tape and transcript. In a letter to Lydia
11 Serafin of the Federal Public Defender's Office, White wrote as follows:

12 Enclosed are the pages with changes I would make to the transcription you
13 sent me. While the transcription on the whole is of good quality, there indeed are a
14 few places where words are missed or, in a couple of instances, changed. I have
15 opted to circle the portion of each page where I made changes, and the attached
16 changes could be collated into the original version. . . .

17 My only other "doubt" regarding this original transcription is the use of the
18 word "house" for the Spanish "rancho." It may well be they were referring to a
19 house, but I personally have not heard the word used that way, so I wouldn't want
20 to make the assumption it necessarily referred to a house, especially in light of the
21 subject matter of the rest of the tape.

22 (Dkt. 43, Ex. B.) Koller forwarded White's revised transcript to Shaw and noted in an
accompanying letter: "Lydia Serafin actually thinks that she can hear more on the tape than Glenna
was able to discern. She is going to talk to Glenna about this." (*Id.*, Ex. C.)

Koller also forwarded White's revised transcript to the government. In a responsive letter,
the government indicated it had retained interpreter Griselda Ruiz to review the May 14th tape and

01 transcripts, “to compare [the] revised portions of the transcript, and to prepare another revised
02 English and Spanish transcript.” (*Id.*, Ex. E.) The government informed Koller and Shaw that,
03 “[i]f necessary, [they could] have Glenna and Griselda meet to resolve any differences they have
04 in their translations.” (*Id.*) In a subsequent letter discussing the May 14th tape, the government
05 indicated that Ruiz had “been able to hear and translate portions of the conversations which were
06 originally identified as ‘unintelligible’ in the draft of the transcript prepared by Brian Clark[,]” and
07 offered to pay for White’s time in working with Ruiz on an agreed transcript. (*Id.*, Ex. H.) Ruiz
08 subsequently produced two transcripts, one in Spanish and the other in English. (*See* Dkt. 30, Ex.
09 8 (English version.))

10 At some point prior to trial, Koller had an individual in her office, Dan Crocker, research
11 the law and arguments supporting exclusion of the May 14th tape based on inaudibility. (Dkt. 30,
12 Ex. 10.) The resulting memorandum notes that “[t]ape recordings that are partially inaudible are
13 admissible unless the defendant establishes that the unintelligible portions are so substantial, in
14 view of the purpose for which the tape is offered, as to render the entire recording as
15 untrustworthy.” (*Id.* at 1 (emphasis removed and cited cases omitted.)) It further notes that
16 “audibility of a recording goes to the weight of the evidence, a jury question, rather than the
17 admissibility thereof[,]” and that the determination of whether the recording is untrustworthy lies
18 within the discretion of the trial court. (*Id.* at 2 (cited cases omitted.)) Crocker indicated: “Most
19 of the cases that I found where defendants raised the inaudibility issue, the district courts admitted
20 the tapes and were upheld on appeal.” (*Id.*) He also discussed two cases where reviewing courts
21 found no error in the refusal to admit partially inaudible tapes, but noted that “the determination
22 of admissibility of tapes is a factual one which is not set out in the case law.” (*Id.* at 3.) Crocker

01 thereafter discussed two possible arguments against admission of the tape, first, that the
02 unintelligible portions were so substantial as to render the tape untrustworthy, and, second,
03 because the tape records a Spanish language conversation, that the jury could not on their own
04 assess the probative value of the tapes or reconcile any discrepancies between the transcription and
05 the recording. (*Id.* at 3-5.)

06 In support of a motion to suppress items seized during the search of petitioner's home and
07 any fruits of that search, Koller described the May 14th tape as "so garbled as to make the ensuing
08 conversation entirely incomprehensible." *See United States v. Mercado-Ulloa*, No. CR 96-415C
09 (Dkt. 40 at 3). In an attached affidavit, Koller added:

10 I have reviewed the transcript provided by the government, which contains an
11 English translation. The tape is of poor quality. According to the transcript, and as
12 verified by a Spanish speaking investigator who listened to the tape, the majority of
13 the material it contains is inaudible, and the portions which can be understood are
without context. There is no direct mention of cocaine or drug dealing audible on this
tape.

14 (Dkt. 46, Ex. O.) Koller also mentioned the audibility issue in her opening and closing arguments
15 at trial, first describing it as "a very poor quality tape[.]" and later stating: "It is not totally clear,
16 the tape isn't good[.]" TR 45-46, 414.

17 Koller did not, however, move the Court to exclude the May 14th tape or otherwise argue
18 against its admission. Instead, when the government suggested at trial that petitioner would be
19 stipulating to the use of a transcript of the May 14th conversation, Koller stated as follows:

20 Actually, I would like to state my position. It is a little less simple than that.
21 I am willing to stipulate that this is the transcript that the informant and the interpreter
came up with when they listened to a tape.

22 I am not necessarily stipulating that it is entirely accurate. I would reserve the

01 right to cross-examine the informant about it. That's my first caveat.

02 And the second is, I don't know what Mr. Miyake was anticipating in this
03 regard, but I would not agree that this should go with the jury when they are
deliberating, because the transcript should not be evidence.

04 TR 177-78. Koller agreed that there was "no point in playing the [Spanish language] tape" and
05 that there was no need to have Ruiz testify about the accuracy of the transcript. TR 178-79. She
06 later stipulated to the admission of the tape without the testimony of a UNET detective. TR 265-
07 66. The government used the English version of the May 14th transcript prepared by Ruiz and
08 the transcript Clarke prepared of the May 9th conversation as aids for the jury. (*See* Dkt. 43, Ex.
09 L and Dkt. 30, Ex. 8.) On cross examination, Koller elicited testimony from Pantoja that "a lot
10 that was on the tape recorder wasn't clear because of static and other people talking." TR 302.

11 Considering the record as a whole, petitioner fails to demonstrate that Koller's
12 performance fell below an objective standard of reasonableness. Moreover, an evidentiary hearing
13 would not alter this conclusion.

14 First, the record shows Koller reasonably concluded that the May 14th tape was at least
15 partially audible. In advance of trial, three professional interpreters, including one hired by Koller,
16 and one of Koller's Spanish speaking co-workers found portions of the tape intelligible. (*See, e.g.*,
17 Dkt. 43, Ex. B. (Glenna White wrote: "While the transcription [by Clarke] on the whole is of good
18 quality"); Ex. C ("Lydia Serafin actually thinks that she can hear more on the tape than
19 Glenna was able to discern.")) Nothing in the record suggests the need for a sound engineer. Nor
20 does there appear to have been any significant confusion in terms of voice identification. Indeed,
21 Pantoja was not the only participant to the conversation available to review the tapes for this
22 purpose. If anything, it can be said that Koller effectively used an interpreter and Spanish speaking

01 coworker to make corrections to the transcript produced by the government. That different
02 interpreters later identified additional discrepancies between the various May 14th transcripts and
03 offered different opinions as to the quality of the tape and transcripts is not particularly surprising,
04 nor does it establish that Koller acted unreasonably at the time of her representation.

05 Second, Koller's decision to not object to the admission of the May 14th tape or the use
06 of a transcript of that tape can be said to fall within the wide range of reasonably effective
07 assistance. The legal memorandum on this issue reveals Koller's consideration of the issue and
08 provides justification for her ultimate decision to forego the argument against admission. (*See*
09 *Dkt. 29, Ex. 10.*) Petitioner does not demonstrate any error in the legal analysis contained in the
10 memorandum. *See, e.g., United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) (“A recorded
11 conversation is generally admissible unless the unintelligible portions are so substantial that the
12 recording as a whole is untrustworthy.”) (quoting *United States v. Lane*, 514 F.2d 22, 27 (9th
13 Cir. 1975)). Nor does he otherwise establish, given the law governing this issue, that the decision
14 to not object fell below an objective standard of reasonableness.

15 Third, the actions Koller did take at trial with respect to the tape and transcript fell within
16 reasonable bounds. Koller did not simply allow the admission of the tape and use of the transcript
17 without comment. Instead, she stipulated that the transcript used at trial was “the transcript that
18 the informant and the interpreter came up with when they listened to a tape[,]” declined to
19 stipulate that the transcript was “entirely accurate[,]” and made reference to the poor quality of
20 the tape from which the transcript was made in both her argument and cross examination of
21 Pantoja. TR 45-46, 302, 414. Because the tape contained a Spanish-language conversation,
22 Koller reasonably agreed that it need not be played for the jury. Moreover, Koller used portions

01 of the tape deemed intelligible to her client's benefit in repeatedly arguing and establishing through
02 questioning that there was no mention of drugs on the tape, while the conversation did include
03 discussion of getting work in the pine tree business. (*See, e.g.*, TR 304 (“[A]nd yet not one word
04 on that tape from the May 14th conversation mentions drugs, does it?”); TR 414 (“It is not totally
05 clear, the tape isn’t good, but it is clear that there is conversation about the pine tree business, and
06 it is clear that nobody says it is a cover operation or a front. Samuel Mercado needed work. The
07 family restaurant had closed four months early. His family was planning on moving to Mexico.
08 That’s why he was at the May 14th meeting, to talk about getting some work in the pine
09 business.”); TR 428 (“The one time that there is proof that those three people ever got together
10 in the same place at the same time, the government made a tape, and there is still no drug talk to
11 bring before you as a jury, because it wasn’t a conversation about drugs.”))¹

12 In sum, petitioner fails to establish that his trial counsel’s performance fell below an
13 objective standard of reasonableness or that an evidentiary hearing is required with respect to this
14 claim.² As such, petitioner’s first ground for relief should be denied.

15 B. Newly Discovered Evidence and Governmental Misconduct

16 In the statement sent to this Court in May 2001, Sanchez indicated petitioner had nothing
17 to do with the drug activity at issue in this case and that, rather than stating that he worked for an

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19 ¹ It should also be noted that, contrary to petitioner’s contention, it does not appear that
20 the May 14th tape was the only evidence Pantoja and petitioner had direct contact. A UNET
21 detective agreed in testimony that “[p]hotographs were in fact taken of Gilberto [Sanchez] and
22 Samuel Mercado driving up and meeting with Mr. Pantoja outside of a McDonald’s[.]” TR 181-
82. It is not clear, however, whether those photographs were introduced into evidence.

² Given this finding, the Court need not address the second prong of the *Strickland*
analysis. *See* 466 U.S. at 697.

01 individual in Bellingham, Sanchez told agents he worked independently and that he could direct
02 them to his drug suppliers in California. (See Dkt. 30, Ex. 15.) Sanchez reaffirmed these
03 assertions in discussions with petitioner's previous and current habeas counsel. (*Id.*, Exs. 16-21.)
04 Here, in his second ground for relief, petitioner asserts his entitlement to a new trial based on this
05 "newly discovered evidence." He also asserts his entitlement to habeas relief based on the
06 government's failure to disclose this exculpatory evidence and its use of perjured testimony on this
07 issue at trial (*see, e.g.*, TR 87-88 (Detective Zweiger testified that, shortly after his arrest, Sanchez
08 indicated he worked for someone in the Bellingham area)).

09 Section 2255 allows for certification of a second or successive petition with an indication
10 of "newly discovered evidence that, if proven and viewed in light of the evidence as a whole,
11 would be sufficient to establish by clear and convincing evidence that no reasonable factfinder
12 would have found the movant guilty of the offense[.]" Entitlement to a new trial based on newly
13 discovered evidence requires a petitioner to establish that: (1) the evidence was newly discovered;
14 (2) the petitioner exercised due diligence in uncovering the new evidence; (3) the new evidence
15 is not merely cumulative or impeaching; (4) the new evidence is material to the issues involved;
16 and (5) the new evidence is such that the petitioner would probably be acquitted in a new trial.
17 *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000).

18 Pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963), suppression of evidence favorable
19 to the accused violates due process where that evidence is material to guilt or punishment,
20 irrespective of the good or bad faith of the prosecution. A *Brady* violation would establish "an
21 error of constitutional dimension justifying postconviction relief under section 2255." *Bauman*
22 *v. United States*, 692 F.2d 565, 572 (9th Cir. 1982). A conviction may also be reversed through

01 a demonstration of the government's knowing use of perjured testimony. *See United States v.*
02 *Sherlock*, 962 F.2d 1349, 1364 (9th Cir.1992).

03 Petitioner maintains that he satisfies the standard for newly discovered evidence, stating
04 that the Sanchez evidence was not discovered until May 2001, that he acted with due diligence
05 in pursuing this claim,³ that the evidence goes to the heart of and is clearly material to the
06 government's case, and that Sanchez's testimony, if deemed credible, would likely result in
07 petitioner's acquittal. He further argues that this evidence supports his contention of both *Brady*
08 violation and the government's knowing use of perjured testimony. Petitioner avers that his
09 preliminary showing on these claims entitles him to an evidentiary hearing. *See, e.g., Bauman*, 692
10 F.2d at 573 ("Only if the record 'conclusively' demonstrated the lack of merit of [the claim as to
11 a *Brady* violation] was the district court correct in dismissing it without ordering an evidentiary
12 hearing.") However, for the reasons discussed below, and as argued by respondent, the Court
13 finds no basis for either holding an evidentiary hearing or granting petitioner habeas relief.

14 First, Sanchez's statement does not qualify as "newly discovered" evidence. Sanchez
15 chose not to testify at trial. (*See* Dkt. 46, Attach. P (written statement signed by Sanchez
16 acknowledging his right to testify, but declining to exercise that right)). "When a defendant who
17 has chosen not to testify subsequently comes forward to offer testimony exculpating a
18 codefendant, the evidence is not 'newly discovered.'" *United States v. Diggs*, 649 F.2d 731, 740
19 (9th Cir. 1981), *overruled sub silentio on other grounds by United States v. McConney*, 728 F.2d
20 1195 (9th Cir. 1984). *See also United States v. Lockett* , 919 F.2d 585, 592 (9th Cir. 1990)

22 ³ Petitioner explains that any delay resulted from the death of his former counsel.

(rejecting the argument that “newly available evidence” can constitute newly discovered evidence; agreeing that “a court must exercise great caution in considering evidence to be “newly discovered” when it existed all along and was unavailable only because a codefendant, since convicted, had availed himself of his privilege not to testify.”) (quoting *United States v. Jacobs*, 475 F.2d 270, 286 n. 33 (2d Cir. 1973)). As explained by the Ninth Circuit:

It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged.

United States v. Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992) (finding a mere allegation that codefendants’ attorneys prevented them from testifying insufficient to establish that the codefendants’ testimony was newly discovered). As such, while Sanchez’s statement and proposed testimony is arguably newly available, it is not newly discovered evidence entitling petitioner to a new trial.

Moreover, even without consideration of the law regarding a non-testifying codefendant, it is questionable whether this evidence could otherwise be deemed newly discovered. That is, much of the information relevant to this ground for relief was available at the time of trial. For example, as discussed further below, testimony from Detective Zweiger reflected Sanchez’s post-arrest statement that he worked for a California supplier and offered to provide information regarding that supplier, as well as his failure to implicate petitioner. *See* TR 117-20. In fact, petitioner appeared to raise these same arguments, albeit in a conclusory fashion, in the first habeas petition he filed in this Court in 1999. *See Mercado-Ulloa*, No. C99-314JCC (Dkt. 1). While petitioner did not at that time possess a written statement by Sanchez, his apparent knowledge as

01 to the substantive basis for this claim calls into question his assertion that the evidence was, in fact,
02 newly discovered, and that he exercised due diligence in uncovering this evidence.

03 Second, petitioner is procedurally barred from pursuing his *Brady* claim. A matter
04 adversely decided on direct appeal cannot be relitigated in a § 2255 petition. *See United States*
05 *v. Scrivner*, 189 F.3d 825, 828 (9th Cir. 1999) (citing *Odom v. United States*, 455 F.2d 159, 160
06 (9th Cir. 1972) (“The law in this circuit is clear that when a matter has been decided adversely on
07 appeal from a conviction, it cannot be litigated again on a 2255 motion.”)) As indicated above,
08 petitioner raised this very argument in a supplemental *pro se* brief supporting his appeal in the
09 Ninth Circuit. (*See* Dkt. 43, Ex. J.) (*See also id.*, Ex. A (the Ninth Circuit described petitioner’s
10 argument as follows: “Mercado argues that the government failed to disclose Sanchez’s post-
11 arrest statement to Detective Zweiger in which Sanchez stated that he worked for someone other
12 than Mercado and was willing to name his cocaine suppliers in California in violation of *Brady* .
13 . . .”)) The Ninth Circuit affirmed petitioner’s conviction, stating with respect to this argument:
14 “Assuming this issue isn’t waived, there is no *Brady* violation because Sanchez’s statements were
15 brought out in examination and cross-examination of Zweiger.” (*Id.*, Ex. A.) Petitioner is,
16 therefore, procedurally barred from pursuing this claim.

17 Finally, as acknowledged by the Ninth Circuit, the record does not support petitioner’s
18 contention of governmental misconduct. Detective Zweiger confirmed that Sanchez did not
19 provide a name for an individual in Bellingham, that Sanchez indicated he had a supplier in
20 California and offered to provide information as to that supplier, and that, in response to
21 questioning, Sanchez said he did not know petitioner. TR 117-20. This testimony provided a
22 sufficient description of Sanchez’s post-arrest statements. (*See also* Dkt. 43, Ex. A (the Ninth

01 Circuit stated in rejecting a confrontation clause argument as to admission of Sanchez's post-arrest
02 statement regarding working for someone in Bellingham and the failure to sever the trials of
03 Mercado and Sanchez: "Mercado did not ask for a limiting instruction; and in light of surveillance
04 that tracked Sanchez to Mercado's residence twice, the pager used to contact them both, evidence
05 taken from Mercado's home, and the testimony of Pantoja linking Mercado to the sale of cocaine,
06 Sanchez's statement that he worked for 'someone in Bellingham' was far from the most damaging
07 evidence against Mercado."))

08 In sum, petitioner fails to establish his entitlement to either an evidentiary hearing or habeas
09 relief based on newly discovered evidence or governmental misconduct. Accordingly, petitioner's
10 second ground for relief should also be denied.

11 CONCLUSION

12 For the reasons set forth above, the Court recommends that petitioner's § 2255 motion be
13 DENIED. No evidentiary hearing is required as the record conclusively shows petitioner is not
14 entitled to relief. A proposed Order of Dismissal accompanies this Report and Recommendation.

15 DATED this 5th day of February, 2007.

16 
17 Mary Alice Theiler
18 United States Magistrate Judge
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